JUDGE RAKOFF

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---X

MICHAEL MARCAVAGE and STEVEN C. LEFEMINE,

Plaintiffs,

v.

THE CITY OF NEW YORK , RAYMOND W. KELLY, in his individual and official capacity as the Commissioner of The New York City Police Department; SERGEANT EBANKS, CAPTAIN STAPLES, OFFICER DONNELLY and AS YET UNKNOWN OFFICERS, in their individual capacities and official capacities as Police Officers for The New York City Police Department.

Defendants.

---X

Civil Case No: 05 CV 4949

COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

Jury Trial Demanded

RECEIVED
MAY 24 2005
U.S.D.C. S.D. N.Y.
CASHIERS

PRELIMINARY STATEMENT

1. This is a civil rights action brought pursuant to the First, Fourth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. 1983. Plaintiffs seek a declaratory judgment and monetary damages for injuries caused by the named Defendants, their agents, servants and employees, and those acting in active concert with them.

JURISDICTION AND VENUE

2. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1331 . Jurisdiction is premised upon the existence of federal questions and deprivations of federally protected civil rights.

3. This Court has jurisdiction, pursuant to 28 U.S.C. § 1343, over this action because it includes federal questions and/or seeks to redress the deprivation, under color of State law,

statute, ordinance, regulation, custom and/or usage rights, privileges and/or immunities secured by the United States Constitution and federal law, which provides for the equal rights of citizens and others, including the Plaintiff, within the jurisdiction of the United States.

4. This Court has authority to declare the rights and legal relations of the parties, pursuant to 28 U.S.C. §§ 2201 and 2202, because this is a case of actual controversy within this Court's jurisdiction.

5. Venue is proper under 28 U.S.C. § 1391(b)(1)and(2). Each and all of the acts alleged herein were committed by Defendants, within the territorial limits of this Court.

6. This Court has authority to grant Plaintiffs' prayer for costs, including attorneys fees, under 42 U.S.C. § 1988.

PARTIES

7. Plaintiff Michael Marcavage, ("Mr. Marcavage") is a natural person who at all times relevant to this action, resided and continues to reside at 62 East Stewart Avenue, Lansdowne, PA 19050.

8. Plaintiff Steven C. Lefemine, ("Mr. Lefemine") is a natural person who at all times relevant to this action, resided and continues to reside at 401 ½ Poplar Street, Cayce, SC 29033.

9. At all times relevant and material herein, the Defendant The City of New York was and still is a municipal corporation, duly organized and existing under and by virtue of the Laws of the State of New York.

10. The Defendant Raymond W. Kelly is the Commissioner of The Police Department of the City of New York, and is sued in individual and official capacity, and at all

times relevant to this action resided and continues to reside in the City and State of New York.

11. The Defendant Sergeant Ebanks is a police officer working for the New York City Police Department, and is sued in his official and individual capacities, and at all times relevant to this action resided and continues to reside in the State of New York.

12. The Defendant Captain Staples is a police officer working for the New York City Police Department, and is sued in his official and individual capacities, and at all times relevant to this action resided and continues to reside in the State of New York.

13. The Defendant Officer Donnelly is a police officer working for the New York City Police Department, and is sued in his official and individual capacities, and at all times relevant to this action resided and continues to reside in the State of New York.

14. Upon information and belief, at all times relevant and material herein, other yet unidentified police officers and/or officials are liable in whole or in part in this action, and will be named in due course.

STATEMENT OF FACTS

15. On the morning of Wednesday, September 1, 2004, during the Republican National Convention at Madison Square Garden, Plaintiffs were peaceably exercising free speech and assembly, by standing on the public sidewalk displaying signs with a pro-life message. More specifically, Plaintiffs were standing on the sidewalk in front of the Pennsylvania Hotel, on the east side of Seventh Avenue, between 32nd and 33rd Streets, across the street from Madison Square Garden.

16. At the time of Plaintiffs' demonstration, the sidewalk where Plaintiffs were standing was open to the public, and scores of people were passing by, unimpeded by Plaintiffs'

First Amendment activities.

17. Defendant Police officers approached Plaintiffs, derided the content of the message on one of their signs, and ordered them to leave the sidewalk where they were standing. Plaintiffs explained that they just wanted to be in "sight and sound" of the attendees of the event, and asked where they *could* go to be in "sight and sound" of the attendees of the event. Police flatly responded "you can't . . . not at all . . . not right here."

18. One of the officers who ordered Plaintiffs to leave was wearing badge number 24678.

19. Mr. Marcavage then asked permission to appeal to Sergeant Ebanks, Community Affairs Officer, who was standing nearby. Mr. Marcavage explained to Sergeant Ebanks that he and Mr. Lefemine wanted to be in "sight and sound" of the attendees of the event. The Sergeant stated that they could not be in the "frozen zone" that police had defined, and directed them to go to a different location.

20. The location to which Defendant Ebanks ordered them to retreat was not in a place where the Plaintiffs could effectively communicate their message to the convention attendees. Mr. Marcavage indicated that the new location was not near where people were coming into the event, and that no one would see or hear them there. The Sergeant replied that Plaintiffs would have to "find a way", but they could not stay where they were. In fact, he stated, "you can't be here, that's why we came here, because you can't be here - that's why I'm here."

21. Mr. Marcavage inquired of the Sergeant, "Which law are we violating if we stand here?" pointing out that the area was not closed to the public and that there were people walking

up and down the sidewalk. Once again the Sergeant flatly asserted that Plaintiffs were not supposed to be there. Mr. Marcavage explained that he was not trying to debate with the Sergeant, but that he was simply trying to determine what law he would be violating if he did not leave the sidewalk, because he believed his presence there was protected by the First Amendment to the United States Constitution.

22. Mr. Marcavage again asked if there was an area where Plaintiffs *could* stand where they would be in "sight and sound" of the people coming into the event. Sergeant Ebanks directed Plaintiffs to go to 8th Avenue and 31st Street. Mr. Marcavage again pointed out that no one would see or hear them there, and that all the convention attendees come through the main area directly across the street from where he was standing.

23. During their conversation with Sergeant Ebanks, Plaintiffs moved from their original location on the sidewalk to the corner across the street, in an effort to cooperate with Defendants. As they were walking, Mr. Marcavage asked Sergeant Ebanks what he thought about the fact that the First Amendment rights of citizens were being violated by the establishment of "frozen zones," and sought to verify that the consequence of Plaintiffs' continuing to stand in their current location would be their arrest.

24. Mr. Marcavage then confirmed with the Sergeant that Plaintiffs had no choice but to move to the location Sergeant Ebanks had directed. Sergeant Ebanks replied "that's where all you guys are supposed to be." Mr. Marcavage objected to the lumping together of all those exercising free speech, all of whom had different views and opinions, and explained that Plaintiffs wanted to be able to express themselves in a separate location.

25. At this point, Mr. Marcavage, expressing that he was very uncomfortable with the

situation, attempted to continue his conversation with Sergeant Ebanks. Captain Staples stepped in and repeatedly began telling Mr. Marcavage that he had to leave the area immediately. Plaintiff Lefemine then asked if he and Plaintiff Marcavage were being threatened with arrest. Captain Staples replied, "no you are already [under arrest]."

26. Plaintiffs repeatedly asked the officers what law they were violating and for what reason they were under arrest. Officers failed to articulate what law Plaintiffs had broken.

27. Officer Donnelly then arrested Plaintiffs. They were handcuffed and taken to a "detention center" at Pier 57.

28. This "detention center" was actually an old abandoned warehouse. The structure itself was contaminated with asbestos and saturated with the stench of diesel oil, and housed over a dozen razor wire cages, where the Plaintiffs were held along with others who had been arrested.

29. During Plaintiffs' processing, some police officers harassed, intimidated, disparaged and verbally abused them. One officer, referring to Mr. Marcavage's pro-life sign, stated several times, "You should have been aborted!" while some of the officers nearby laughed.

30. After spending several hours in the warehouse, Mr. Lefemine and Mr. Marcavage, along with other detainees, were handcuffed and loaded onto a hot, cramped, police bus, where they sat for approximately one hour before being driven at high speed by police escort to Central Booking.

31. Plaintiffs were subsequently chained to other arrestees, jailed, and abused, by systematically transferring them from one overcrowded cell to another, to deprive them of the

the ability to sleep. Plaintiffs were forced to either sit on the grease and grime covered jail floor, or to stand for hours, as there was only limited bench seating. The cells were humid, and everyone was dirty. At times, Plaintiffs were chained to other arrestees for hours, and had to sit on the floor in the jail's hallway while awaiting a transfer to another overcrowded cell.

32. Plaintiffs Michael Marcavage and Steve Lefemine spent over 32 emotionally and physically draining hours in jail, during which they were degraded, disrespected, insulted and abused.

33.Judge John Cataldo held the City of New York in contempt for refusing to comply with his order directing them to release over 560 people, including the Plaintiffs, who had been detained for an unreasonable length of time, without having been arraigned .

34. Plaintiffs Michael Marcavage and Steve Lefemine were charged with Disorderly Conduct. Cases against both Plaintiffs were ultimately dismissed, albeit not without causing unnecessary hardship, expense, and injustice to Plaintiffs. Mr. Marcavage had to return to New York City from Lansdowne several times for court appearances, which was burdensome and time consuming.

FIRST CAUSE OF ACTION

VIOLATION OF PLAINTIFFS' FOURTH AMENDMENT RIGHTS PURSUANT TO THE UNITED STATES CONSTITUTION

35. Plaintiffs incorporate the preceding paragraphs herein the same as though pleaded in full.

36. Defendants have violated Plaintiffs' constitutional rights to be free from an illegal search and seizure, by illegally seizing, searching, arresting, restraining and imprisoning

illegal search and seizure, by illegally seizing, searching, arresting, restraining and imprisoning the plaintiffs, without probable cause, without legal authority, and without a warrant, and in retaliation for their lawful exercise of their First Amendment rights to Free Speech and Freedom of Association.

37. The charges against the Plaintiff's were ultimately dismissed.

38. As a result of Defendants' unlawful and unconstitutional acts, Plaintiffs were caused to suffer fear, intimidation, anxiety, mental anguish, emotional distress, loss of freedom and liberty, embarrassment and impingement on their Free Speech and Freedom of Association rights.

SECOND CAUSE OF ACTION

VIOLATION OF PLAINTIFFS' DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

39. Plaintiffs incorporate the preceding paragraphs herein the same as though pleaded in full.

40. Defendants have deprived the Plaintiffs of their liberty interests without due process of law, by illegally seizing, searching, arresting, restraining and imprisoning the Plaintiffs, without probable cause, without legal authority, and without a warrant and in retaliation for Plaintiffs' lawful exercise of their First Amendment rights to Free Speech and Freedom of Association.

41. The charges against the Plaintiffs were ultimately dismissed.

42. As a result of the Defendants' unlawful and unconstitutional acts, Plaintiffs were

caused to suffer fear, intimidation, anxiety, mental anguish, emotional distress, loss of freedom and liberty, embarrassment and impingement on their Free Speech and Freedom of Association rights.

THIRD CAUSE OF ACTION

VIOLATION OF PLAINTIFFS' EQUAL PROTECTION RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

43. Plaintiffs incorporate the preceding paragraphs herein the same as though pleaded in full.

44. Defendants have violated Plaintiffs' Equal Protection Rights by treating them differently than similarly situated individuals, in connection with the exercise of a fundamental right, by illegally seizing, searching, arresting, restraining and imprisoning the Plaintiffs without probable cause, without legal authority, and without a warrant and in retaliation for Plaintiffs' lawful exercise of their First Amendment rights to Free Speech and Freedom of Association.

45. The charges against the Plaintiff's were ultimately dismissed.

46. As a result of the Defendants' unlawful and unconstitutional acts, Plaintiffs were caused to suffer fear, intimidation, anxiety, mental anguish, emotional distress, loss of freedom and liberty, embarrassment and impingement on their Free Speech and Freedom of Association rights.

FOURTH CAUSE OF ACTION

VIOLATION OF PLAINTIFFS' FIRST AMENDMENT RIGHTS

47. Plaintiff incorporates the preceding paragraphs herein the same as though pleaded

in full.

48. Defendants have violated Plaintiffs' First Amendment rights to Free Speech and Freedom of Association, by illegally seizing, searching, arresting, restraining and imprisoning the Plaintiffs without probable cause, without legal authority, and without a warrant, in retaliation for Plaintiffs' lawful demonstration and communication in a traditional pubic forum.

49. Defendants engaged in content based speech discrimination, without the showing of a compelling government interest.

50. Defendants failed to demonstrate or articulate any reasonable time, place or manner restriction of Plaintiffs' speech activities.

51. Defendants exercised unbridled discretion, while implementing a prior restraint on Plaintiffs' constitutionally protected expression.

52. Defendants failed to maintain any objective standards to govern their authority to prohibit Plaintiffs' otherwise constitutionally protected speech.

53. Defendants retaliated against Plaintiffs because they persisted in their effort to engage in free expression in a quintessential public forum.

54. As a result of the Defendants' unlawful and unconstitutional acts, Plaintiffs were caused to suffer fear, intimidation, anxiety, mental anguish, emotional distress, loss of freedom and liberty, embarrassment and impingement on their Free Speech and Freedom of Association rights.

55. A trial by jury is demanded.

WHEREFORE, the Plaintiffs respectfully seek judgment against the Defendants as follows:

A. Compensatory damages against all Defendants to be determined by a jury;

B. Punitive damages against all Defendants to be determined by a jury;

C. A declaratory judgment finding that the Defendants have violated Plaintiffs' constitutional rights as set out in Plaintiffs' First, Second, Third and Fourth causes of action;

D. An award of attorneys' fees pursuant to 42 U.S.C. 1988;

E. All costs and disbursements incurred in this action;

F. Any other and further relief as this Court would deem necessary and proper.

Dated: New York, New York
May 17, 2005

Respectfully submitted,

Brian W. Raum, Esq. (BR-1967)
LAW OFFICES OF BRIAN W. RAUM, P.C.
Attorneys for the Plaintiffs
99 Wall Street 19th Floor
New York, NY 10005
212-361-3717 (tel)
212-361-3719 (fax)
BWR@RaumLaw.com